No. 12,272

IN THE

United States Court of Appeals

For the Ninth Circuit

EARL W. TAYLOR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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OPINION BELOW.

The Court rendered no opinion.

JURISDICTION.

The appellant, Earl W. Taylor, was indicted on February 16, 1949, in the District Court for the Northern District of California, Southern Division, as follows:

Count One—for wilfully and knowingly attempting to evade and defeat his personal income taxes in the amount of $1,331.70, for the calendar year 1944, in violation of Section 145(b), Internal Revenue Code;

Count Two—for wilfully and knowingly attempting to evade and defeat his personal income taxes in the amount of $4,550.52, for the calendar year 1945, in violation of Section 145(b), Internal Revenue Code;

Count Three—for wilfully and knowingly attempting to evade and defeat the personal income tax of his wife, Yvette Taylor, in the amount of $4,550.52, for the calendar year 1945, in violation of Section 145(b), Internal Revenue Code;

Count Four—for wilfully and knowingly attempting to evade and defeat his personal income tax in the amount of $1,766.59, for the calendar year 1946, in violation of Section 145(b), Internal Revenue Code.

On February 23, 1949, appellant pleaded guilty to Count Two of the indictment before the Honorable Michael J. Roche, Chief United States District Judge, and the other three counts were dismissed. After entry of the plea of guilty, Terence J. Carey, a special agent of the Bureau of Internal Revenue, took the stand and recited certain facts in connection with Taylor's background, whereupon he was cross-examined by Taylor's counsel. The appellant, on March 2, 1949, was sentenced to five years' imprisonment. On March 3, 1949, appellant filed a petition for a writ of habeas corpus alleging insanity of appellant, which petition was denied on March 21, 1949, for failure to comply with Section 2255 of the Judicial Code. (28 U.S.C. Section 2255.) A motion to vacate judgment was subsequently filed and at the hearing thereon, the Court reviewed all prior proceedings of the matter, received the reports of the two psychiatrists

who had been appointed by the Court to examine into the mental condition of the appellant and heard the testimony of one of the psychiatrists with respect to his findings. This appeal is from an order of Judge Roche denying the motion to set aside the judgment rendered on March 2, 1949.

STATEMENT OF QUESTIONS INVOLVED.

1. Was the Honorable Michael J. Roche disqualified to pass upon the motion to vacate judgment and sentence because of personal bias and prejudice?

2. Was the motion to vacate judgment and sentence properly denied in view of appellant's assertion that he was not mentally competent?

3. Was the testimony of a special agent of the Bureau of Internal Revenue properly admitted and considered by the Court after the plea of guilty in determining the length of sentence imposed?

4. Was the imposition of a sentence of five years' imprisonment in conformity with law?

5. Was appellant deprived of any of his constitutional rights in the proceedings herein?

STATUTES INVOLVED.

Title 26, Internal Revenue Code:

Sec. 145. PENALTIES.

* * * * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code.

Title 28, United States Code Judiciary and Judicial Procedure:

Sec. 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE.

* * * * * * *

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * * * * * *

STATEMENT.

On February 16, 1949, appellant was indicted and on the same day he was taken into custody by a deputy marshal. The indictment was in four counts under Section 145(b) of the Internal Revenue Code (26 U.S.C. 1940 Ed., Sec. 145(b)). The maximum penalty provided by this section on each count is five years' imprisonment or $10,000 fine or both. Arraignment of appellant was on February 17, 1949. He appeared in Court with counsel. Upon request of appellant's counsel, the case was continued until February 23, 1949, for plea. (Tr. 4.) On the latter date, appellant appeared with counsel and entered a plea of guilty to Count Two of the indictment, whereupon the other three counts were dismissed. After the entry of the plea of guilty to Count Two and dismissal of the other counts, Terence Carey, a special agent of the Bureau of Internal Revenue, was called to the stand and gave testimony relating to his investigation of appellant's tax liability and his personal history. Special Agent Carey was cross-examined by appellant's counsel. Upon objection by appellant's counsel to certain testimony, the Court stated (Tr. 11):

> We are not trying the case; there is a plea of guilty that has been entered here. The plea is now before me. In order to determine punishment, anything that occurred in relation to this defendant is admissible in relation to a report or showing made in court.

Upon completion of the cross-examination of Special Agent Carey, the matter was referred to the Proba-

tion Officer for a report on March 2, 1949, the date set for sentencing of appellant. On the latter date, appellant's counsel made the following representations to the Court, among others (Tr. 18):

> The decision of the defendant to plead guilty before the Court to one of the four counts of the indictment was made after serious consultation with me, in the present period. I think he searched his own conscience at that time and asked himself sincerely whether he was guilty of all four of them or whether he was guilty of one. Upon his direction and his own conviction that he was guilty of the one, I have so represented to the Court; that is before your Honor today, and I believe it is the second count.
>
> Since that time I have made various visits to the prison to interview the gentleman and I have had various conferences with the probation officer.

Before passing sentence, the Court inquired of appellant whether there was anything he might wish to say. Appellant replied, "No, your Honor." (Tr. 21.) The Court then imposed a sentence of five years, with $50 costs of prosecution added.

On the following day appellant filed a petition for a writ of habeas corpus *in pro per,* basing his petition on the ground "that petitioner is now and has been since 1943, legally insane." (Earl W. Taylor, Petitioner v. John A. Roseen, Acting U. S. Marshal, Respondent No. 28,666-G.) The hearing on this petition was before the Honorable Louis E. Goodman

on March 21, 1949. An oral challenge was made to Judge Goodman on the ground of bias and prejudice. The basis alleged for this challenge was a statement attributed to Judge Goodman on July 17, 1945, in the case of *Taylor v. Bowles,* Administrator of the Office of Price Administration, Case No. 24,949-G. Appellant's counsel stated that Judge Goodman had used language in that case substantially as follows: " 'This witness'—meaning Mr. Taylor—'is an arrogant young man who desires to rule the roost.' " (Tr. 25.)

Judge Goodman dismissed the petition for a writ of habeas corpus on the grounds that appellant had not complied with the provisions of Section 2255 of the Judicial Code. (28 U.S.C. Sec. 2255.) Subsequently appellant, by his counsel Lou Ashe, Esq., filed a motion to vacate judgment pursuant to the provisions of Section 2255, in which the allegation was made that appellant was suffering from a mental disorder. Upon a hearing on this motion on April 21, 1949, which came before Judge Roche, the report of Milton B. Lennon, M.D. and P. P. Poliak, M.D., psychiatrists appointed by the Court on April 7, 1949, to examine into appellant's mental condition, was filed. In this report the following conclusion appeared (Tr. 39):

> Conclusion. It is our opinion that the defendant is an emotionally unstable, highly neurotic individual and a psychopathic personality. All this constitutes a psychiatric disorder and not of a type rendering the subject mentally incompetent. He is fully cognizant of the nature of his

> acts, suffers no delusions or hallucinations, recognizes the difference between right and wrong and is quite capable of appreciating the gravity of the charges against him. It is our further opinion that he was, legally, mentally competent at the time of his guilty plea, at the time of his sentence and for a substantial prior period.
>
> Respectfully submitted,
> Milton B. Lennon, M.D.
> P. P. Poliak, M.D.

Dr. Poliak took the stand and was cross-examined by Mr. Ashe, counsel for appellant. At the conclusion of this hearing, the Court stated (Tr. 60, 61):

> Upon a full consideration of the matter as it now stands submitted, it is ordered that the motion of the defendant, Earl W. Taylor, to vacate the judgment and sentence of this court heretofore rendered, be and it is hereby denied. That is all.

Mr. Ashe asked to be relieved of further representation of Mr. Taylor and appellant then stated, "I would like to file a motion of appeal from this order." (Tr. 61.) A written notice of appeal from the order was filed with the District Court on April 25, 1949, by appellant *in pro per.*

ARGUMENT.

I.

THE SENTENCING JUDGE WAS NOT DISQUALIFIED FROM HEARING THE MOTION TO VACATE JUDGMENT.

It should be noted at the outset that the first attempt to challenge the District Judge on the ground of bias and prejudice occurred after sentence was imposed. It should also be noted that the record fails to disclose a single allegation of fact which would suggest personal bias or prejudice on the part of Judge Roche. It was not until after appellant attempted to attack the Court's sentence on a petition for a writ of habeas corpus and later on a motion to vacate judgment, that he made allegations of bias and prejudice.

Section 144 of the Judicial Code (28 U.S.C. Sec. 144), provides as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit as to any judge.

> It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

This section is very clear in the requirement that an affidavit shall be filed which states the facts and reasons for the belief that bias or prejudice exists. It provides that such affidavit be filed not less than ten days before the beginning of the term at which the proceeding is to be heard and that such affidavit be accompanied by a certificate of counsel of record stating that it is made in good faith. No such affidavit has been filed in this case nor do any facts appear in the record upon which such an affidavit could be predicated.

Aside from the lack of foundation for such an affidavit and the failure to file it, it is evident that the section has no application in this proceeding to vacate judgment. The challenge of personal bias or prejudice must be made to a judge before sentence is passed. Were this not so, a defendant could take his chances with a judge and if the sentence seemed severe, he could attempt to have a disqualification and a hearing before another judge. In *United States v. 16,000 Acres of Land,* 49 F. Supp. 645, it was clearly brought out that the provision of the statute should be strictly construed. The Court there said:

> Strict and full compliance with these provisions of the statutes is required. Scott v. Beams, 10 Cir., 122 F. (2d) 777, 778; Cuddy v. Otis, 8 Cir., 33 F. (2d) 577.
>
> The purpose of the statutory provision in reference to the requirement of a certificate of coun-

sel of record is well set out in Newman v. Zerbst, 10 Cir., 83 F. (2d) 973, 974, where the court said:

"The affidavit did not 'state the facts and the reasons for the belief' of the existence of such bias or prejudice, and was not accompanied by a certificate of counsel of record that the affidavit and application were made in good faith as required by the statute. Moreover, counsel for petitioner in open court stated he could not make such a certificate. * * *

"It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury."

In *United States v. Costea,* 52 F. Supp. 3, 4, the Court states with respect to the filing of an affidavit of prejudice after sentence:

* * * It was conceded by counsel at the time of sentencing that the defendant was clearly guilty of the offense charged, and that the only purpose in filing this document was the defendant's opinion that some other judge might impose a lighter sentence. This statute is not for the accomplishment of such a purpose, nor has any Judge the right to evade his official duty by voluntarily withdrawing at the request of a defendant. This statute provides for the filing of an affidavit before hearing, and has no application after a plea of guilty has been entered.

In *Ex parte American Steel Barrel Company,* 230 U.S. 35, 33 S. Ct. 1007, 1010, the Supreme Court has

the following to say with respect to the application of this provision:

> The basis of the disqualification is that "personal bias or prejudice" exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term.

It is manifestly clear that Judge Roche had no choice but to deny the motion to vacate judgment on the ground of personal bias and prejudice since no facts had been presented suggesting any bias or prejudice. Even if there had been facts and reasons for the belief on appellant's part that personal bias or prejudice existed, such facts and reasons should have been presented before appellant stood before the Court for judgment.

II.

APPELLANT WAS MENTALLY COMPETENT AT THE TIME HE ENTERED HIS PLEA OF GUILTY.

Appellant alleges that he was not of sound mind at the time he entered a plea of guilty to count two of the indictment. On the motion to vacate judgment, Judge Roche gave careful consideration to this issue.

In the Federal Courts two tests are generally applied when present insanity is claimed: (1) was the defendant capable of understanding the nature of the proceedings, and (2) could he rationally advise with his counsel in preparing his defense. *Youtsey v. United States* (C.C.A. 6th), 97 Fed. 937. The form of procedure in making its determination is within the discretion of the Court. Four methods have been generally employed:

(1) Committal of the defendant to an institution for observation and report;

(2) Appointment of a commission or a psychiatrist to examine the defendant and make a report;

(3) Calling in the assistance of a jury; and

(4) Conduct of the inquiry by the judge alone. *United States v. Chisholm* (C.C. S.D. Ala.), 149 Fed. 284; *Whitney v. Zerbst* (C.C.A. 10th), 62 F. (2d) 970; *United States v. Harriman* (D.C. S.D. N.Y.), 4 F. Supp. 186.

In this case Judge Roche appointed two psychiatrists who made a report on the mental condition of appellant. One of these took the stand and was sub-

jected to cross-examination by appellant's counsel. In addition to the assistance of the psychiatrists, Judge Roche had available the reports of the probation officers attached to the District Court. Appellant on September 12, 1948, had completed a five-year probation period on a sentence under a plea of guilty to a Federal offense (Tr. 9), so was well known to the probation office. Judge Roche also had had the opportunity of observing appellant in the courtroom. It is evident from what appellant's counsel stated at the time of sentence that he considered appellant rational and capable of understanding the nature of the proceedings and the consequences of a plea of guilty. Counsel said (Tr. 18):

> Mr. Ashe. The decision of the defendant to plead guilty before the Court to one of the four counts of the indictment was made after serious consultation with me, in the present period. I think he searched his own conscience at that time and asked himself sincerely whether he was guilty of all four of them or whether he was guilty of one. Upon his direction and his own conviction that he was guilty of the one, I have so represented to the Court; that is before your Honor today, and I believe it is the second count.
>
> Since that time I have made various visits to the prison to interview the gentleman and I have had various conferences with the probation officer.

Appellant's counsel has not contended that his client was legally insane or incapable of understanding the consequences of his acts. In any event that matter was

set at rest by the report of the psychiatrists who reached the following diagosis:

> Conclusion. It is our opinion that the defendant is an emotionally unstable, highly neurotic individual and a psychopathic personality. All this constitutes a psychiatric disorder and not a type rendering the subject mentally incompetent. He is fully cognizant of the nature of his acts, suffers no delusions or hallucinations, recognizes the difference between right and wrong and is quite capable of appreciating the gravity of the charges against him. It is our further opinion that he was, legally, mentally competent at the time and the time of his sentence and for a substantial prior period.
>
> Respectfully submitted,
>
> Milton B. Lennon, M.D.
> P. P. Poliak, M.D.

Appellant urges that the findings of the psychiatrists were based on false testimony. (Br. 8.) He states that the doctors' report is based partially on the finding that a Wasserman test was taken in September, 1947 and found to be negative. He concludes that this must be false because he asserts he has had a Wasserman taken at McNeil Island in 1949, which was found to be positive. He also states that Public Health records at San Francisco will show that he had a Wasserman test in 1941 which was shown to be positive. It would, of course, be possible for a person to have a positive Wasserman in 1941, a negative Wasserman in 1947 and a positive Wasserman again in 1949. Irrespective of what the true facts are with

regard to the Wasserman tests this matter was explored by appellant's counsel on cross-examination of Dr. Poliak insofar as it related to appellant's mental condition. (Tr. 40-41.)

Cross-examination.

Mr. Ashe. Q. Mr. Poliak, in connection with any claim of venereal disease, you did not presently, during this examination, give him another Wasserman test, did you sir?

A. No, I did not.

Q. Then we cannot say with certainty that he is not at the present time suffering from some venereal disease until we would make some examination, is that correct, Doctor?

A. That's correct.

Q. Was there any reason why another examination was not made while he was being examined by you and the other gentleman?

A. I was not authorized to make any laboratory or physical examinations.

Q. I see. Did you feel that upon the history that such a matter was indicated?

A. No, I did not.

Q. There were no symptoms that you could find which were visible to the eye which would lead you to suspect the possibility of a second outbreak of any type of venereal disease?

A. No, there were none.

Q. But you would, would you not, Doctor, if you were so authorized, have made such an examination?

A. Well, if I were specifically requested; but I didn't feel it was necessary in this particular situation.

Q. Then it remains that the only Wasserman that we know was taken was so many years ago, at which time it was pointed out it was negative; correct, Doctor?

A. Yes.

It appears from Dr. Poliak's testimony that the presence or absence of venereal disease was not relevant to his determination of the question of sanity of the appellant.

A careful reading of the record will disclose that Judge Roche exercised scrupulous care in reaching his determination that appellant was sane. His decision was embodied in the following order:

> WHEREAS, the defendant, by and through his counsel, did suggest and nominate P. P. Poliak, M.D., and the United States Attorney did suggest and nominate Milton B. Lennon, M.D.,; that thereupon the Court did appoint both of said doctors and did direct that the said psychiatric examination be made and that said physicians report their findings to this Court on April 21, 1949; and
>
> WHEREAS, the Court did on said 7th day of April, 1949, deny that portion of the motion to vacate with relation to the alleged bias and prejudice of this Court; and
>
> WHEREAS, on this the 21st day of April, 1949, the said doctors have filed their written report with this Court in which they jointly find and state as their professional opinions that the said defendant was at the time of their examination, and at the time he entered his plea of guilty

herein, and at the time of the judgment and sentence herein, and for a substantial period prior thereto mentally competent in that he knew and understood the difference between right and wrong and knew and understood the consequences of his acts in the premises; and

WHEREAS, on said date of April 21, 1949, a hearing on said motion to vacate with relation to the sanity of the defendant was had and evidence was introduced, including the report of the physicians aforesaid, and made a part of the record in the above-entitled case; and

WHEREAS, it is the opinion and finding of this Court that the said deefndant, Earl W. Taylor, at the time of the entry of his plea of guilty to Count Two of the indictment herein, at the time of the judgment and sentence herein, at the time of the hearings, heretofore referred to, and for a substantial period prior thereto, was and is legally sane and mentally competent in that he knew and understood the difference between right and wrong, knew and understood the nature and consequences of his acts, and was competent to advise with counsel; and

WHEREAS, the Court is fully advised in the premises, and good cause therefore appearing:

IT IS ORDERED that the motion of the defendant, Earl W. Taylor, to vacate the judgment and sentence of this Court heretofore rendered be and it is hereby denied.

Dated: April 21, 1949.

Michael J. Roche
Chief United States District Judge.

The District Court having reached its conclusion after careful deliberation that finding should not be disturbed on appeal in the absence of a clear showing of abuse of discretion and as stated in a recent article on this subject: "* * * appellate tribunals are generally reluctant to find an abuse of that discretion." Pollak, Insanity as a Bar to Prosecution in the Federal Courts. 7 Federal Bar Journal 55 (1945-46).

In this case Judge Roche gave the fullest consideration to the claim of insanity and the record discloses no serious basis for doubting appellant's sanity.

III.

TESTIMONY OF A SPECIAL AGENT OF THE BUREAU OF INTERNAL REVENUE WAS PROPERLY ADMITTED TO ASSIST THE COURT IN DETERMINING THE AMOUNT OF PUNISHMENT.

In the supplemental brief filed by appellant's counsel, the position is taken that error was committed by Judge Roche in admitting the testimony of Terence Carey, a special agent of the Bureau of Internal Revenue. The only authority cited by appellant which appears to be directly in point is *Townsend v. Burke,* 334 U.S. 736, 68 S.Ct. 1252. However, the facts in that case are readily distinguishable from those in the case at bar. The primary ground of reversal by the Supreme Court in the *Townsend* case was the failure to advise *Townsend* of his right to counsel or to offer to assign counsel. As the Court states (p. 1255):

The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxaphone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two other of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile, and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing Court, did not influence the sentence which the prisoner is now serving.

We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the Court or was prejudiced but the Court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the Court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. * * *

We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state Court's denial of habeas corpus. * * *

* * * * * * *

In this case, counsel might not have changed the sentence, but he could have taken steps to see

> that the conviction and sentence were not predicated or misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.

In that case not only was the defendant unrepresented by counsel, but it appeared from the record that the sentencing judge had drawn certain unwarranted conclusions with respect to defendant's prior criminal history.

In the instant case the record shows that the special agent who had investigated the income tax affairs of appellant gave a recital of certain facts which not only referred to the taxable year covered by the Court to which a plea of guilty was entered but also gave testimony relating to other taxable years. The testimony of the special agent shows that the operators of a certain bar who had retained appellant as tax counsel had paid money over to Taylor in 1946 which had never reached the Bureau of Internal Revenue. (Tr. 11.) Counsel for appellant had ample opportunity to cross-examine with respect to this particular transaction and the Court made it clear that this testimony was being considered not in relation to the indictment but for the purpose of assisting it in imposing sentence. (Tr. 13.)

Rule 32 of the Federal Rules of Criminal Procedure (18 U.S.C., following Section 687), provides that the report of the presentence investigation shall contain any prior criminal record of the defendant and such other information as the Court may require:

> Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and *such other information* as may be required by the Court. (Emphasis supplied.)

It is evident that the Court has wide discretion regarding the matters it may take into consideration in determining the sentence to be imposed. The record contains no indication whatever of unfairness in this regard. The special agent gave his testimony in open Court and was subjected to cross-examination. It has not been claimed nor does the record disclose that any statement he made was false. The mere assertion by the special agent that certain transactions occurred does not necessarily constitute an accusation of the commission of a crime. Such testimony was clearly a proper matter for the Court to consider in measuring the sentence, but even if the extreme view were taken that the evidence was improperly received, the presumption should be applied that the Court disregarded such incompetent evidence. See, *Seber v. Thomas,* 108 F. (2d) 856; *United States v. 6.87 Acres of Land,* 147 F. (2d) 351. It should be noted that the testimony of the special agent was taken on February 23, 1949, and an adjournment was taken at the request of appellant's counsel for one week for submission of a presentence report. (Tr. 17):

Mr. Ashe. May I address the Court: I would would like to have this matter continued subject to your Honor's convenience and the calendar until perhaps tomorrow or the next day for the purpose of your Honor's sentence.

The Court. I may indicate to you that it would take a few days for—how many days, Mr. Probation Officer?

The Probation Officer. May we have until March 2nd, your Honor? That is one week.

The Court. Is that agreeable?

Mr. Ashe. Whatever is convenient to your Honor. We would like to expedite it if possible.

The Court. That will give you a full opportunity to make any showing you wish on behalf of your client. My duty seems clear. If he wants to be sentenced this morning I would have no hesitancy in sentencing him on the charge. One week. * * *

When appellant was sentenced on March 2, 1949, Judge Roche had before him not only the testimony of the special agent but the reports of two psychiatrists and those of the Probation Office. As the record shows (Tr. 9), appellant was discharged from five years' probation in the Federal District Court on September 13, 1948. The Probation Office, therefore, had before it not only the report of the special agent and the psychiatrists but its own records of the appellant's activities for the five years just expired, during which time Taylor was under the supervision of that office.

The question of the type of evidence which a Court might properly hear in determining the sentence was

considered in *Stephan v. United States,* (C.C.A. 6th), 133 F. (2d) 87, certiorari denied, 63 S.Ct. 858. In that case appellant was convicted of treason and sentenced to death by hanging. In affirming the judgment of the District Court, the Sixth Circuit had this to say with respect to presentence procedure:

> * * * To aid it in the discharge of its duty and in order that the Court might feel certain that the sentence to be imposed was a just and proper one, the Judge on one occasion at the request of appellant's wife, had an interview with her. On another occasion he had an interview with the appellant, his wife and a friend. On these occasions the interviews took such direction as the appellant and his wife desired. In addition to these interviews the Judge had other conversations with representatives of the Federal Bureau of Investigation and the Chief Probation Officer as well as with counsel for appellant and the United States Attorneys who prosecuted the case.
>
> The record indicates that these various interviews took place in the Chambers of the Judge. The information thus made available is set forth in great length in connection with the sentence. Appellant insists that this procedure was improper. We take judicial notice that the practice of presentence investigations has long been followed in District Courts. See Tractenberg v. United States, 53 App. D.C. 396, 293 F. 476, 480; Stobble v. United States, 7 Cir., 91 F. (2d) 69, 71; Sharp v. United States, 4 Cir., 55 F. (2d) 227. See also Title 18, Ch. 22, Sec. 727, U.S.C.A., which makes it the duty of a probation officer to investigate any case referred to him for investigation

by the Court and his further duty to perform such other duties as the Court may direct. The Rules of Practice and Procedure in Criminal Cases, supra, 292 U.S. page 661, 54 S.Ct. XXXVII, under the heading "I. Sentence" also clearly recognize not only the propriety but the importance of such investigation. We think, however, that such information should have been disclosed to the Judge in open Court and in the presence of appellant. Such appears to have been the practice in the cases cited. We think that the interest of convicted persons, about to be sentenced is more carefully safeguarded by open hearings under such rules as the Court may adopt. * * *

As appears from the opinion, the sentence was there upheld on appeal even though the sentencing judge had interviews with representatives of the Federal Bureau of Investigation and the Chief Probation Officer in chambers. In the case at bar all proceedings were had in open Court and appellant was represented by counsel at every stage of the proceedings.

IV.

IT WAS NOT AN ABUSE OF DISCRETION FOR THE COURT TO GIVE THE MAXIMUM SENTENCE PROVIDED BY STATUTE.

Appellant was under indictment for attempting to defeat and evade income taxes in violation of Section 145(b) of the Internal Revenue Code. The indictment was in four counts. The maximum penalty which could be imposed under this statute on each count was

five years' imprisonment or $10,000 fine or both. Upon a trial of the cause, if appellant had been found guilty on all counts, he could legally have been sentenced to twenty years' imprisonment and fined $40,000. Appellant not only was represented by competent counsel but for several years prior to his indictment had publicly held himself out as an authority on tax law. In entering his plea of guilty, he was undoubtedly conscious of the severe penalty which might be imposed if he stood trial and was convicted on all counts. The real complaint which appellant now seems to have is that he took a chance on a plea of guilty to one count and fared worse on the sentence than he had anticipated. He makes certain comparisons in his brief between the sentence he received and several other sentences meted out in other tax cases. As the record shows, appellant was not only a "tax counselor" who advised many taxpayers with respect to their tax responsibilities to the Government, but he was a twice convicted felon and had been under five years' probation during the period covered by the four counts of the indictment. (Tr. 9.) These matters quite properly were considered by Judge Roche in passing sentence.

It is too well settled to require the citation of authority that Appellate Courts will not disturb a sentence which is within the maximum permitted by statute. It may be appropriate, however, to note that an argument similar to the one presented here was advanced in *Rose v. United States,* 128 F. (2d) 622, (C.C.A. 10th) certiorari denied, 317 U. S. 651. In

that case the indictment was in two counts for violation of Section 145(b) of the Internal Revenue Code. Appellant was found guilty on both counts and sentenced to a term of five years on each count with provision that the two sentences should run consecutively. The opinion of the Court is very explicit on the point here involved:

> The final contention which merits brief notice is that the punishment imposed was unusual, harsh and cruel, and not justified or sustained by the purported facts adduced at the trial. Each count in the indictment charged a separate offense under 26 U.S.C.A. Int. Rev. Code § 145(b); and the maximum penalty fixed by the statute for each offense is a fine of not more than $10,000, or imprisonment for not more than five years, or both. The fixing of penalties for criminal offenses is a legislative function, and ordinarily a sentence within the limits of the applicable statute will not be disturbed on appeal for being unusual, excessive, or cruel. Schultz v. Zerbst, 10 Cir., 73 F. (2d) 668; Reavis v. United States, 10 Cir., 106 F. (2d) 982; Moore v. Aberhold, 10 Cir., 108 F. (2d) 729; McCleary v. Hudspeth, 10 Cir., 124 F. (2d) 445.

Appellant was undoubtedly disappointed in the sentence he received and he is correct in his statement that lighter penalties have been imposed on other tax evaders in some cases. But the penalty has been established by the legislature, and the Court, in its discretion, imposed a sentence coming within the statutory maximum. It was appropriate, indeed imperative, that the Court consider the past criminal record

mary purpose of an indictment is to inform the defendant of the offense with which he is charged so as to enable him properly to prepare his defense. The Rules of Criminal Procedure are specific in regard to the use of citations of statutes under which the indictment is brought.

Rule 7(c) provides, in part, as follows (18 U.S.C. following Sec. 687):

> * * * Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if error or omission did not mislead the defendant to his prejudice.

The indictment charged appellant with attempted tax evasion. He was adequately informed of the alleged violation and even if the citation had been omitted or erroneously designated he would have suffered no prejudice thereby. In any event, the Code made no changes in the law. The Senate Committee noted in its report, S. Rep. No. 20, 76th Cong., 1st. Sess. (1939-2 Cum. Bull. 535):

> This Code contains all the law of a general and permanent character relating exclusively to internal revenue in force on January 2, 1939. In addition, it contains the internal revenue law relating to temporary taxes, the occasion for which arises after the enactment of the Code. The following should be noted in connection with the general character of the Code:
>
> First. It makes no changes in existing law.

The section under which appellant was indicted had been part of the law many years before it was incorporated in the Internal Revenue Code. The indictment was properly brought under Section 145(b) of the Internal Revenue Code and appellant was fully informed of the charges against him.

C.

Section 145(b) has no relation to the penalty prescribed for perjury.

Appellant concedes "that he might be charged with perjury under the Section 145(b). But such a charge is not made in the indictment." (Tr. 15.) He apparently concludes that an indictment under Section 145(b) is void because of the confusion of tax evasion with perjury.

The indictment in this case was brought under Section 145(b) of the Internal Revenue Code. Appellant has confused Section 145(c) (26 U.S.C. 1940 Ed., Sec. 145(c)) with Section 145(b). Section 145(c) provides as follows:

> Any individual who wilfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in Section 125 of the Criminal Code.

This section has no relation to Section 145(b) under which this indictment was brought. Consequently, there is no merit in appellant's argument in this regard.

D.

There has been no violation of any constitutional provisions.

In his brief, appellant has complained of several violations of his constitutional rights. Among these is the allegation that his books were seized without a search warrant. He also states that after an alleged unlawful seizure had been made and a lien placed against his assets, "defendant appeared before these said agents on many occasions during the year 1947 and the year of 1948 and cooperated with them to the best of appellant's ability." (Br. 23.) It is clear that the Collector of Internal Revenue and the Commissioner of Internal Revenue have authority under Sections 3614 and 3615 of the Internal Revenue Code (26 U.S.C. 1940 Ed., Sec. 3614, 3615) to make proper examination of the books and records of a taxpayer without first obtaining a search warrant. There is no evidence in the record nor has any evidence been advanced subsequent to the proceedings in the District Court to show any unlawful act on the part of the Government agents. In fact the above-quoted portion of appellant's brief indicates that he voluntarily supplied information to the Government agents during their examination into his income tax affairs.

Appellant has advanced other contentions which are totally without merit. The real substance of appellant's complaint has been summed up in his brief on page 24, where he states:

> Appellant did plead guilty, relying upon the advice of Counsel that he would receive some consideration from the Court because of his plea of

guilty. Appellant received no consideration from the Court.

Appellant took his chances under four counts of an indictment under which he could have received a maximum sentence of twenty years' imprisonment. He was given the maximum sentence on the one count to which he pleaded guilty. No substantial reason has been given by appellant for disturbing the action of the District Court in imposing a five-year sentence which was fully justified under the particular facts and circumstances disclosed to the Court prior to the imposition of sentence.

CONCLUSION.

In view of the foregoing, the denial of the motion to vacate judgment and sentence should be affirmed.

Dated, San Francisco, California,
September 23, 1949.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,
ROBERT B. MCMILLAN,
Assistant United States Attorney,
ERNEST R. MORTENSON,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Appellee.

12273

United States

Court of Appeals

For the Ninth Circuit.

SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION, LTD., a non-profit corporation, etc., et al.,

Appellants,

vs.

RETAIL CLERKS UNION, LOCAL NO. 770, an unincorporated association, etc., et al.,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court for the Southern District of California Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

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440 Subway Terminal Bldg.,
417 S. Hill St.,
Los Angeles 13, Calif.

For Appellees: Retail Clerks Union, Local No. 770 et al:

ALEXANDER B. SCHULLMAN
415 Subway Terminal Bldg.,
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Los Angeles 13, Calif.

For Appellees: Retail Clerks Union No. 324 et al:

ROBERT W. GILBERT,
LOUIS A. NISSEN,
117 W. 9th St.,
Los Angeles 15, Calif. [1*]

*** Page numbering appearing at bottom of page of original certified Transcript of Record.**

In the United States District Court, Southern District of California, Central Division

No. 9098—BH

SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION, LTD., a Nonprofit Corporation, Individually and as Representative of Its Members; RALPH P. CANEER and JOHN C. PEARSON, Individually and as Partners Doing Business as (Caneer and Pearson Drug Co.); J. DONALD OWENS and MARSHALL MALLOY, Individually and as Partners Doing Business as (Owens and Malloy Prescription Pharmacy); RALPH P. CANEER, JOHN C. PEARSON, J. DONALD OWENS and MARSHALL MALLOY, as Representatives of Other Employers Similarly Situated; GEORGE J. GINGRAS and PETE NEGRETE, Registered Pharmacists, Individually and as Representatives of Other Pharmacists Similarly Situated; JAMES A. BENNETT and CHARLES G. WEIR, Student Pharmacists, Individually and as Representatives of Other Student Pharmacists Similarly Situated,

Plaintiffs,

vs.

RETAIL CLERKS UNION, LOCAL No. 770, an Unincorporated Association, and JOSEPH T. DeSILVA, Individually and as Secretary of

Said Organization; RETAIL CLERKS UNION, LOCAL No. 324, an Unincorporated Association, and RICHARD L. JOHNSTON, Individually and as Secretary of Said Organization; FOOD AND DRUG COUNCIL OF LOS ANGELES AND VICINITY, an Unincorporated Association; THOMAS PITTS, Individually and as President of Said Organization, and JOSEPH T. DeSILVA, Individually and as Secretary of Said Organization;

DOE ONE TO DOE TWO HUNDRED (Inclusive of All Intervening Numbers as Though Each Said Doe was Severally and Separately Designated); [2]

DOE ONE CORPORATION TO DOE ONE HUNDRED CORPORATION (Inclusive of All Intervening Numbers as Though Each Said Corporation Was Severally and Separately Designated);

DOE ONE PARTNERSHIP TO DOE ONE HUNDRED PARTNERSHIP (Inclusive of All Intervening Numbers as Though Each Said Partnership Was Separately and Severally Designated);

DOE ONE ASSOCIATION TO DOE ONE HUNDRED ASSOCIATION (Inclusive of All Intervening Numbers as Though each said Association Was Separately and Severally Designated),

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs allege that:

I.

This suit is brought under the Federal Declaratory Judgment Act of June 14, 1934 (28 U.S.C. 400), on a claim and an actual controversy arising under a law regulating commerce, to wit: the Labor Management Relations Act, 1947 (29 U.S.C. Section 141 et seq.), and the above-entitled Court has jurisdiction under 28 U.S.C. Section 41 (8) and the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand dollars ($3,000.00), so that the above-entitled Court has jurisdiction under 28 U.S.C., Section 41(1) and the Court has power to declare the rights and legal relations of the parties interested, and said parties are entitled to such declaration, the same to have the force and effect of a final judgment or decree, and to be reviewable as such.

II.

The plaintiff, Southern California Retail Druggists Association, Ltd., is a nonprofit corporation, organized and [3] existing under the laws of the State of California, composed of approximately 1120 members who are retail druggists and own retail drug stores in Southern California.

III.

Plaintiffs Ralph P. Caneer and John C. Pearson, are partners doing business as Caneer and Pearson

Drug Co. in the City of Long Beach, and plaintiffs J. Donald Owens and Marshall Malloy are partners doing business as Owens and Malloy Prescription Pharmacy in the City of Los Angeles, and are members of plaintiff Southern California Retail Druggists Association, Ltd., hereinafter referred to as Druggists Association. All of said plaintiffs bring this complaint on their own behalf and on behalf of all other members of said Druggists Association who are within the jurisdiction, geographically and otherwise, of the defendant Retail Clerks Union, Local No. 770, or Retail Clerks Union, Local No. 324, and on behalf of all other drug store owners who are within said jurisdiction of either of the defendant local unions and who may hereafter join in the prosecution of this suit; that all of said members and other drug store owners who may join are too numerous to be joined as parties plaintiff; that the questions to be determined herein are of common and general interest to the many persons constituting such class, all of said class being similarly situated.

IV.

Plaintiffs George J. Gingras and Pete Negrete are [4] pharmacist employees in Abrams' Drug Company and Exclusive Prescription Pharmacy, respectively, and plaintiffs James A. Bennett and Charles G. Weir are student pharmacists employees in Exclusive Prescription Pharmacy, which drug stores are members of said Druggists Association and are located within said jurisdiction of defend-

ant local unions and bring this action on behalf of themselves and on behalf of all other pharmacists and student pharmacists similarly situated who are employed in drug stores that are members of said Druggists Association within the said jurisdiction of defendant local unions and on behalf of all other pharmacists and student pharmacists in said jurisdiction who are similarly situated and may hereafter join in the prosecution of this suit; that the questions to be determined herein are of common and general interest to the many persons constituting such class, all of said class being similarly situated.

V.

Defendants Doe One to Doe Two Hundred (inclusive) and each of them, now are, and at all times herein mentioned have been parties to the unlawful activities, combinations and agreements hereinafter mentioned.

Defendants Doe One Corporation to Doe One Hundred Corporation (inclusive) are, and each of them is, and at all times hereinafter mentioned have been parties to the unlawful activities, combinations and agreements hereinafter mentioned.

Defendants Doe One Partnership to Doe One Hundred Partnership (inclusive) are, and each of them is, and at all times hereinafter mentioned have been parties to the unlawful activities, combinations and agreements hereinafter mentioned.

Defendants Doe One Association to Doe One Hundred Association (inclusive) are, and each of them

is, and at all times hereinafter mentioned have been parties to the unlawful activities, combinations and agreements hereinafter mentioned. [5]

VI.

Plaintiffs are informed and believe, and upon such information and belief allege, that defendants Doe One to Doe Two Hundred, Doe One Corporation to Doe One Hundred Corporation, Doe One Partnership to Doe One Hundred Partnership and Doe One Association to Doe One Hundred Association (all inclusive) are, and at all times mentioned in this complaint have been acting in concert with the specifically named defendants with respect to the acts and matters hereinafter mentioned and with respect to the unlawful activities, combinations and agreements hereinafter mentioned.

VII.

Defendants Doe One to Doe Two Hundred, Doe One Corporation to Doe One Hundred Corporation, Doe One Partnership to Doe One Hundred Partnership, and Doe One Association to Doe One Hundred Association are fictitious names; said persons, corporations, partnerships and associations are designated herein by such fictitious names because their true names are to the plaintiffs unknown, and plaintiffs will ask leave to substitute their true names by amendment to this complaint as soon as their true names become known.

VIII.

Defendants Retail Clerks Union Local #770 and

Retail Clerks Union Local #324, Food and Drug Council of Los Angeles and Vicinity and Doe One Association to Doe One Hundred Association, inclusive, were at all times herein mentioned and now are unincorporated associations functioning as labor organizations, each having its principal place of business in the County of Los Angeles, State of California, and associated with one other and with the American Federation of Labor. Said unincorporated associations are hereinafter, for convenience, sometimes referred to as the defendant local unions. [6]

IX.

The defendant union officers are sued herein individually and in their respective official capacities and as representatives of the members of the defendant local unions and union councils. All of the members of defendant local unions and union councils have not been made defendants herein because by reason of their number it would be impractical to bring them all before the Court, but the causes of action set forth herein are of common and general interest to each and all of said members.

X.

That the plaintiff employers and all of said drug store proprietors purchase 75% to 100% of their drugs, patent medicines, etc., out of the State of California for the purposes of resale in this State and substantial quantities of other articles are purchased from out of the State and sold at retail

in this State; that the plaintiff Southern California Retail Druggists Association represent the members of its association, all of such members purchasing 75% to 100% of its drugs and patent medicines out of the State of California, as well as large quantities of other merchandise for purposes of resale in this State; that the plaintiffs George J. Gingras and Pete Negrete, and other pharmacists represented in this action, are pharmacists employed in drug stores purchasing 75% to 100% of its drugs and patent medicines out of the State of California, as well as large quantities of other merchandise; that all of said drug stores are engaged in activities which affect interstate commerce within the meaning of the National Labor Relations Act and Labor Management Relations Act of 1947.

XI.

That representatives of the defendant local unions have stated to the named plaintiff employers and to various other plaintiff employers, and plaintiffs believe, and upon such information and belief allege, that such statements and proposals will in [7] the near future be directed toward other employers who are plaintiffs in this action: that said defendant union Local No. 324 desires to be the sole and exclusive representative of the employees of those of said plaintiffs whose place of business is located in or about the City of Long Beach, and said union Local No. 770 desires to be the sole and exclusive representative of the employees of those of said

plaintiffs whose place of business is located in or around the City of Los Angeles, and said defendant unions have requested plaintiffs to sign a contract, the terms of which provide that plaintiffs shall employ only members of the one of said local unions representing said employees and that all of the employees of plaintiffs, including the registered pharmacists and student pharmacists be members of one or the other of said local unions.

XII.

That the representatives of the defendant local unions maintained and still maintain that for the purposes of collective bargaining, the pharmacists do not constitute a separate class; that the pharmacists are not professional employees within the meaning of the Labor Management Relations Act, 1947, Sec. 2 (12) and Sec. 9(b) (29 USC, Sec. 152(12) and Sec. 159(b)); the defendants have classified pharmacists as being nonprofessional employees for purposes of said contract; that said defendants refuse to concede that the pharmacists have a right to maintain a separate collective bargaining unit and contend that said pharmacists should be grouped in a single bargaining unit with the nonprofessional employees.

XIII.

That all of the plaintiffs herein contend that pharmacists are professional employees within the meaning of Section 2 (12) and Section 9 of the Labor Management Relations Act, 1947; [8] that

said pharmacists under the Labor Management Relations Act constitute a separate collective bargaining unit and may not be grouped in a single collective bargaining unit with nonprofessional employees in said agreement or any similar agreement, until an election, with the voting restricted to pharmacists in each drug store, has been held, and the majority vote thereof controls in accordance with the provisions of the Labor Management Relations Act of 1947.

XIV.

That the representatives of the defendant local unions maintained and still maintain that for the purpose of collective bargaining, the student pharmacists who are acting under the direct supervision of pharmacists compounding physician's prescriptions, preparing pharmaceutical preparations and other things as set forth in Section 4093 of the California Business and Professions Code which defines pharmaceutical experience necessary before a license can be obtained constitute a separate class; that the student pharmacists are not professional employees within the meaning of Section 2 (12) and Section 9 (b) of the Labor Management Relations Act, 1947, 29 U.S.C. 152 (12) and Section 159 (b); that the defendants have classified student pharmacists as being regular employees for purposes of said agreement; that said defendants refuse to permit the student pharmacists who are acting under the direct supervision of pharma-

cists to maintain a separate collective bargaining unit and contend that said student pharmacists should be grouped in a single bargaining unit with the nonprofessional employees. [9]

XV.

That the plaintiffs James A. Bennett and Charles G. Weir, student pharmacists, contend that student pharmacists are professional employees within the meaning of Sec. 2(12) and 9(b) of the Labor Management Relations Act, 1947; that said student pharmacists under the Labor Management Relations Act, 1947, constitute a separate collective bargaining unit and may not be grouped in a single collective bargaining unit with nonprofessional employees in said agreement or any similar agreement, until an election, with the voting restricted to student pharmacists in each drug store, has been held, and the majority vote thereof controls in accordance with the provisions of the Labor Management Relations Act of 1947.

XVI.

That the defendants Retail Clerks Union, Local No. 770 and No. 324 have not filed with the Secretary of Labor any of the reports, forms, affidavits and other documents required by Section 9(f), 9(g) and 9(h) of the Labor Management Relations Act, 1947; that the defendants have not filed an application for an election to determine whether they are proper bargaining agents for pharmacists in

said drug stores and/or the other employees of said drug stores. Defendants have not been certified by the National Labor Relations Board as the proper bargaining unit for any employees of plaintiffs, or any of the other members of the Druggists Association, and neither [10] defendant represents a majority of all of the employees, nor a majority of the pharmacists, nor a majority of the student pharmacists employed at any one drug store, nor employed at all of the drug stores owned by plaintiffs and none of said pharmacists have voted to be included in either of said unions as a member or to be represented by them or by a member of the bargaining unit represented by said unions.

XVII.

That in the latter part of 1947 and continuously thereafter and up to and including the time of filing of this action, representatives of the defendant local unions stated to certain of the plaintiff employers and to the plaintiff, Retail Druggists Association, that said local unions desired to represent employees of said plaintiff employers for the purpose of collective bargaining and requested plaintiff employers to execute the agreement hereinabove referred to, and representatives of said local unions stated to certain of said plaintiff employers on numerous occasions and still state and threaten, that unless plaintiff employers execute said agreement, said local unions would cause the respective business establishments to be picketed. On November 6, 1947,

defendant Joseph T. DeSilva, Secretary of the Food and Drug Council of Los Angeles and Vicinity and Secretary of Retail Clerks Union Local No. 770 caused the Sureway Drug Company located at 8539 South Vermont, Los Angeles, California, to be picketed and said picketing continued for some period of time; that the defendant local unions contend that they have the right to peacefully picket all of said drug stores who are plaintiffs in this action, notwithstanding said local unions failure to comply [11] with the Labor Management Relations Act of 1947, for the purposes of:

1. Compelling pharmacists and student pharmacists to become members of said union without the right of a separate collective bargaining unit; and

2. Compelling pharmacists and student pharmacists of said businesses to become members of said unions before an election has been had to determine the wishes of the majority of said employees, as provided for in Section 9(b) (1) and 9(e) of the Labor Management Relations Act of 1947; and

3. Plaintiffs have been informed by agents and representatives of said defendants and believe, and upon such information and belief allege, that a further purpose for the asserted right to maintain pickets at said places of business is to compel the plaintiff employers to sign said contract; and

4. Plaintiff employers and the Druggists Association contend that the purpose of said picketing

is to encourage common carriers and for preventing employees from transporting and delivering supplies to and from said business establishments and thus to impose economic coercion on said plaintiff employers in order to compel them to sign said agreement.

XVIII.

Plaintiff employers and plaintiff Retail Druggists Association contend in refusing to execute said agreement with the defendant unions that if picketing is begun for any of the purposes set forth above in paragraph XVII as said union contends they have a right to do, it would constitute a violation of Section 8(b) (2) of the Labor Management Relations Act and constitute unfair practice of a labor organization in that said picketing would coerce the employers to discriminate against all of said employees and/or pharmacists; that said picketing would in turn compel the employers, plaintiffs herein, to violate Section 8(a)(3) [12] of the Labor Management Relations Act. which provides that an employer can make an agreement with a labor organization requiring union membership If Such labor organization is the representative of the employees, as provided in Section 9(a) And If the board has certified per an election that at least a majority of employees qualified to vote have voted to authorize such labor organization to make such agreement; that the defendants contend that such picketing would not be a violation of Section 8(b)

(2) of the Labor Management Relations Act, nor that it would compel plaintiff employers to violate Section 8(a) (3) of said act.

XIX.

That plaintiffs George J. Gingras and Pete Negrete, pharmacists, and plaintiffs James A. Bennett and Charles G. Weir, student pharmacists, and all of the pharmacists and student pharmacists represented herein, contend that such picketing would infringe on the rights guaranteed them under Section 7 of the Labor Management Relations Act where the employee has a right to refrain from any or all activities as authorized by Section 8(a) (3) and that said picketing would be in violation of Section 8(a) (1) of the Labor Management Relations Act where it is deemed an unfair practice of the labor organization to coerce employees in exercise of any of the rights guaranteed them in Section 7 of said act; that said unions contend that such picketing would not infringe on any of the rights guaranteed the pharmacists under Section 7 of said act, nor would such constitute an unfair practice of a labor organization in violation of Section 8(a) (1) of said act.

XX.

That plaintiffs George J. Gingras and Pete Negrete, pharmacists, and plaintiffs James A. Bennett and Charles G. Weir, student pharmacists, and all of the pharmacists and student pharmacists represented herein, contend that said picketing

would infringe on the rights given them as professional employees to [13] vote separately and maintain a separate collective bargaining unit as guaranteed them in Section 9(b) (1) of the Labor Management Relations Act; that defendant contends that said picketing would not infringe on any rights guaranteed plaintiff pharmacists and student pharmacists to maintain a separate collective bargaining unit for the reason that they are not professional employees within the meaning of said act.

XXI.

That plaintiff pharmacists and student pharmacists contend that they would not have to join said unions if the employers sign said agreement, since they have not been allowed the privilege of a separate bargaining unit; that defendant unions contend that said pharmacists would be compelled to join said unions if the employer sign said contract, whether the unions have been certified as collective bargaining agents of said pharmacists and student pharmacists or not.

XXII.

That plaintiff employers and the Retail Druggists Association contend that if said agreement were entered into, it would be invalid in its entirety in those business concerns where the union does not represent any employees or pharmacists or student pharmacists whatsoever; that it would be invalid insofar as it pertains to pharmacists and student

pharmacists in those business establishments where the unions already represent the nonprofessional employees; that the defendants contend that said agreement would not be invalid in its entirety, nor would any part thereof be invalid, for any of the reasons heretofore alleged.

XXIII.

That plaintiff employers contend that picketing would be for the purpose of encouraging common carriers and their employees in the normal course of their employment from transporting [14] and delivering supplies to and from said plaintiffs' business establishments and thus impose economic coercion on said plaintiffs in order to compel them to sign said agreement; that such picketing would bein violation of Section 8 (b)(4)(A), as well as Section 8(b)(2) of the Labor Management Relations Act, the first provision being against secondary boycotts; that such picketing for said purpose is further illegal due to the fact that said unions have not complied with the provisions of the Labor Management Relations Act heretofore alleged; that defendants contend that such is not the purpose, but even if it is, it does not constitute a violation of Section 8(b)(2) nor 8(b) (4)(A) of the Labor Management Relations Act.

Wherefore, plaintiffs pray for declaratory judgment:

1. That pharmacists in all of the drug stores who are represented in this action be classified as pro-

fessional employees within the meaning of Section 2(12) of the Labor Management Relations Act of 1947.

2. That student pharmacists in all of the drug stores who are represented in this action be classified as professional employees within the meaning of Section 2(12) of the Labor Management Relations Act of 1947.

3. That it be declared that picketing by a labor organization which has or has not filed the affidavits and documents required by Section 9(f)(g) and (h) of the Labor Management Relations Act for the purpose of compelling pharmacists and/or student pharmacists to become members of said union without the right of a separate collective bargaining unit constitutes unfair practice of a labor organization under Section 8(a)(1) of the Labor Management Relations Act, and further such picketing infringes on the rights guaranteed said pharmacists and student pharmacists guaranteed them [15] under Section 7 of the Labor Management Relations Act.

4. That it be declared that picketing by a labor organization which has or has not filed the affidavits and documents required by Section 9(f)(g) and (h) of the Labor Management Relations Act for the purpose of compelling plaintiff employers to sign an agreement, which agreement includes pharmacists and student pharmacists in the category of nonprofessional employees where the union has not been certified as a bargaining agent of said pharma-

cists, constitutes a violation of Section 8(b)(2) and that such picketing does in turn compel employers to violate Section 8(a)(3) of the Labor Management Relations Act.

5. That it be declared that pharmacists and student pharmacists would not be compelled to join said unions in the event their respective employer signed said labor agreement, which included them as nonprofessional employees where they have not been allowed to be recognized as a separate collective bargaining unit.

6. That it be declared that an agreement entered into between and employer and a labor organization, which labor organization has not filed the documents and affidavits required in the Labor Management Relations Act, nor has been certified as a collective bargaining agent of any of the employees of such an employer, be declared invalid in its entirety.

7. That it be declared that a labor agreement entered into by an employer and labor organization, where the agreement provides that pharmacists and student pharmacists should not be treated as professional employees, be declared invalid as to that part whether said union has filed its documents under the Labor Management Relations Act or not.

8. That it be declared that picketing of a business concern by a labor organization that has not filed the documents and affidavits required under the Labor Management Relations Act, [16] nor

which is a certified bargaining agent of any of the employees of said business establishment for the purpose of encouraging common carriers and their employees in the normal course of their employment from transporting and delivering supplies to and from such a business establishment constitutes a violation of Section 8(b)(4)(A) of the Labor Management Relations Act, as well as a violation of Section 8(b)(2) of the Labor Management Relations Act.

8. For costs of this action and for such other and further relief as may be just.

J. WESLEY CUPP,
ROY B. WOOLSEY,
Attorneys for Plaintiffs.

By /s/ J. WESLEY CUPP.

State of California,
County of Los Angeles—ss.

George Q. Baird being by me first duly sworn, deposes and says: that he is the Executive Secretary of plaintiff corporation Southern California Retail Druggists Association, Ltd., one of plaintiffs herein and suing in behalf of all of its members, in the above entitled action; that he has read the foregoing Complaint for Declaratory Judgment and knows the contents thereof; and that the same is true of his own knowledge, except as to the mat-

ters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ GEORGE Q. BAIRD.

Subscribed and sworn to before me this 10th day of January, 1949.

[Seal] /s/ SHAN E. BULLOCK,
Notary Public in and for the County of Los Angeles, State of California.

Copy received:

[Endorsed]: Filed Jan. 11, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT

To J. Wesley Cupp and Roy B. Woolsey, 440 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California, attorneys for plaintiffs;

Please Take Notice That on the 14th day of March, 1949, at 10:00 a.m. or as soon thereafter as counsel can be heard, defendants will appear before this court at the United States Post Office and Courthouse Building in the City of Los Angeles, State of California, and will bring the following motion on for hearing:

I.

To dismiss this proceeding on the ground that the court lacks jurisdiction over the same, in that the complaint herein has been filed under color of authority of the Labor Management Relations Act, 1947, (29 U. S. C., Sec. 141 et seq.) and that as provided by Section 10 of this Act and decisions interpreting this Act which are contained in the Memorandum of Points and Authorities attached hereto and made a part of this motion, the National Labor Relations Board has exclusive jurisdiction over all controversies involving unfair labor practices and interprets and administers the unfair labor management act in the first instance except where specific jurisdiction over the subject matter is conferred.

II.

To dismiss this proceeding on the ground that the essential elements of Federal jurisdiction have not been met in the complaint in that there is no showing other than by conclusion that the matter in controversy exclusive of interests and costs exceeds the sum of $3,000 nor is there any showing of [20] diversity of citizenship between the parties or any showing that Federal jurisdiction is secured pursuant to any federal statute applicable hereto.

III.

To dismiss this proceeding for a Declaratory Judgment on the ground that under the Federal Declaratory Judgment Act of June 14, 1934, (28

U. S. C., Section 400) and entitled, Title 28, Chapter 151, Sections 2201 and 2202 under the new Federal Judicial Code, and also under Article III, Section 2 of the Constitution of the United States, no case or justiciable controversy is raised by the complaint herein, and that as a matter of fact plaintiffs are herein merely seeking an advisory opinion contrary to the meaning and intent of the Declaratory Judgment Act and Article III, Section 2 of the United States Constitution above-mentioned.

IV.

To dismiss the proceeding herein on the grounds that the complaint is sham and frivolous and does not state a cause of action.

V.

To dismiss this proceeding herein on the grounds that there is not a proper joinder of parties nor a common question of law or fact involved nor a common relief sought as required by Rule 23 of the Rules of Federal Court.

/s/ ROBERT W. GILBERT,
/s/ LOUIS A. NISSEN,
Attorneys for Particular Defendants Retail Clerks' Union No. 324 and Richard L. Johnston. [21]

Memorandum of Points and Authorities

I.

Labor Management Relations Act, 1947 (29 U. S. C., Section 141 et seq.).

II.

Neither a United States District Court nor a State court has any legal right to infringe upon the exclusive jurisdiction of the National Labor Relations Board by entertaining an action brought by a private party to prevent alleged "unfair labor practices" of employers or unions. The National Labor Relations Board was and remains with exclusive jurisdiction to determine whether or not unfair labor practices have been committed and to afford relief against the continuation of such practices. The Federal District Courts are without jurisdiction to redress by injunction or otherwise the unfair labor practices defined in the National Labor Relations Act.

Amazon Cotton Mill Company vs. Textile Workers Union of America, (decided April 1, 1948, C.C.A. 4th), 167 Fed. (2d) 183.

Dixie Greyhound Bus Lines vs. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, 15 Labor Cases 74,687 (C.C.A. 8th D. November 26, 1948), ... Fed. ...., ... U. S. .....

International Longshoremen's and Warehousemen's Union vs. Sunset Line and Twine Co., (U. S. Dist. Ct., N. D. Cal. April 8, 1948), 77 Fed. Supp. 119.

See also Bakery Sales Drivers' Local Union vs. Wagshal, 333 U. S. p. 442.

Gerry of California vs. Superior Court, 32 Cal. (2d) 119, 194 P. (2d) 689, decided by Cal. Supreme Court June 16, 1948.

In Re DeSilva, 33 A. C. 44 decided November 16, 1948.

III.

The Supreme Court of the United States has also recognized the application of the long settled rule of the judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

Meyers vs. Bethlehem Steel Corp., 303 U. S. at pp. 50-51.

See also Newport News Co. vs. Schauffer, 303 U. S. 54 (58 Sup. Ct. 466).

United Brick and Clay Workers vs. Lebus, 71 Fed. Supp. 121. [22]

IV.

The Declaratory Judgment Act in no way enlarges the jurisdiction of the Federal courts; one of the usual bases of jurisdiction must be shown to exist.

Putnam vs. Ickes, 78 Fed. (2d) 223 (dismissed for improper venue for lack of jurisdiction over the land whose patent was sought to be revoked and over defendants in personam).

V.

The danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events—although it may involve future benefits or disadvantages—and the prejudice to his position must be actual and genuine and not merely possible or remote to entitle a plaintiff to the rendition of a declaratory judgment.

Borchard Declaratory Judgments, Page 56.

VI.

Rules of Federal Court, Rule 23—Class Actions.

Affidavit of Service by mail attached.

[Endorsed]: Filed March 2, 1949. [23]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT

To: J. Wesley Cupp and Roy B. Woolley, 440 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California, Attorneys for Plaintiffs:

Please Take Notice that on the 14th day of March, 1949, at 10:00 A.M., or as soon thereafter as counsel can be heard, [25] Defendants, Retail Clerks Union, Local No. 770, an unincorporated association, and Joseph T. DeSilva, individually and as secretary of

said organization; Food and Drug Council of Los Angeles and Vicinity, an unincorporated association; Thomas Pitts, individually and as president of said organization, and Joseph T. DeSilva, individually and as secretary of said organization, will appear before this Court at the United States Post Office and Courthouse Building, in the City of Los Angeles, State of California, and will move to dismiss the Complaint for Declaratory Relief filed by Plaintiffs herein, upon the grounds and for the reasons as follows:

I.

That said Complaint does not, nor does any paragraph or part thereof, state facts sufficient to constitute a cause of action against these Defendants.

II.

That said Complaint does not, nor does any paragraph or part thereof, set forth jurisdictional facts sufficient to vest this Federal Court with jurisdiction of the alleged subject matter of the action; in that the Complaint has been filed under purported authority of the Labor Management Relations Act, 1947 (29 U.S.C. Sec. 141 et seq), and that as provided by Section 10 of this Act and the decisions thereunder, as set forth in the Memorandum of Points and Authorities attached hereto and made a part of this Motion, the National Labor Relations Board has exclusive jurisdiction over all controversies involving unfair labor practices and interprets and administers the Labor Management Re-

lations Act in the first instance except where specific jurisdiction over the subject matter is conferred.

III.

That the subject matter of the action allegedly set forth in said Complaint is beyond the jurisdiction of the Court, [26] since in the first instance, the determination, under the Labor Management Relations Act, 1947, of whether or not any given party is within the purview of the Act, is within the exclusive jurisdiction of the National Labor Relations Board.

IV.

That this Court has no jurisdiction of the subject matter set forth in the Complaint, since under the Labor Management Relations Act, 1947, any relief which may resolve the matters allegedly set forth in the Complaint could only be secured either by an injunction or other appropriate remedy, jurisdiction of which rests exclusively under the Labor Management Relations Act, 1947, with the National Labor Relations Board in the first instance.

V.

That the Complaint fails to set forth any facts legally sufficient to confer jurisdiction on this Court in respect to the proper and ultimate allegation of substantive facts to establish interstate commerce within the purview of the Labor Management Relations Act, 1947.

VI.

That the essential elements of Federal jurisdiction have not been met in the Complaint, in that there is no showing other than by conclusion that the matter in controversy exclusive of interests and costs exceeds the sum of $3,000, nor is there any showing of diversity of citizenship between the parties or any showing that Federal jurisdiction is secured pursuant to any Federal statute applicable hereto.

VII.

That under the Federal Declaratory Judgment Act of June 14, 1934, (28 U.S.C. § 400), and entitled, Title 28, Chapter 151, Sections 2201 and 2202 under the new Federal Judicial Code, and also under Article III, Section 2 of the Constitution of the [27] United States, no case or justiciable controversy is raised by the Complaint herein, and that as a matter of fact, Plaintiffs are herein merely seeking an advisory opinion contrary to the meaning and intent of the Declaratory Judgment Act and Article III, Section 2 of the United States Constitution above-mentioned.

VIII.

That there is not a proper joinder of parties nor a common question of law or fact involved, nor a common relief sought as required by Rule 23 of the Rules of Federal Court.

Wherefore, these appearing Defendants pray that

the Complaint be dismissed and that they recover their costs of suit incurred herein.

Dated: March 3, 1949.

Respectfully submitted,

/s/ ALEXANDER H. SCHULLMAN,

Attorney for Defendants Retail Clerks Union, Local 770, Joseph T. DeSilva, individually and as Secretary thereof; Food and Drug Council of Los Angeles and Vicinity, Thomas Pitts, individually and as President thereof; and Joseph T. DeSilva, individually and as Secretary thereof. [28]

Memorandum of Points and Authorities

I.

Labor Management Relations Act, 1947 (29 U.S.C. Sec. 141 et seq).

II.

The relief requested by Plaintiffs in their Complaint for Declaratory Relief is tantamount to requesting a declaration by this Court that Defendants, either in their actions as alleged or in their contemplated actions, are committing or intend to commit unfair labor practices within the meaning of Section 10 (b) (2) and Section 8 (b) (4) (A), of the Labor Management Relations Act, 1947; neither United States District Courts nor State Courts have any jurisdiction, concurrent or other-

wise, to entertain an action brought by a private party to prevent alleged "unfair labor practices" of employers or unions. The National Labor Relations Board was and remains with exclusive jurisdiction to determine whether or not unfair labor practices have been committed and is the exclusive agency, Congressionally created, to afford relief against a continuation of such practices. The Federal District Courts are without jurisdiction to redress by injunction or otherwise the unfair labor practices defined in the Labor Management Relations Act, 1947.

Amazon Cotton Mill Company vs. Textile Workers Union of America (decided April 1, 1948, C.C.A. 4th), 167 Fed. (2d) 183;

Dixie Greyhound Bus Lines vs. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, 15 Labor Cases 74,687 (C.C.A. 8th D. November 26, 1948), ... Fed. ....., U.S. .....;

International Longshoremen's and Warehousemen's Union vs. Sunset Line and Twine Co. (U.S. Dist. Ct., N.D. Cal. April 8, 1948), 77 Fed. Supp. 119;

See also Bakery Sales Drivers Local Union vs. Wagshal, 333 U.S. p. 442;

Gerry of California vs. Superior Court, 32 Cal. (2d) 119, 194 P. (2d) 689, decided by Cal. Supreme Court June 16, 1948;

In Re DeSilva, 33 A.C. 44 decided November 16, 1948:

in [29] this matter, an owner of a drug store who was plaintiff in the action brought in the Superior Court of the County of Los Angeles, State of California, and who was and is a member of the Plaintiff Association in this action, and who was then represented by the same counsel as represents Plaintiffs in this action, sought relief by requesting an injunction against the instant Defendants in this matter for the alleged unfair labor practices committed by said Defendants. The State Superior Court granted the injunction, and thereupon, following an alleged violation of the injunction, one of the Defendants was found guilty of contempt, and upon a writ of Habeas Corpus to the California State Supreme Court, the Court unanimously renunciated that exclusive jurisdiction for redress by injunction or otherwise of unfair labor practices as defined in the Labor Management Relations Act, 1947, rests exclusively with the National Labor Relations Board, and no private party may initiate any action either in the State or Federal Courts for such relief.

III.

The Supreme Court of the United States has also recognized the application of the long settled rule of the judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

Meyers vs. Bethlehem Steel Corp., 303 U.S.

at pp. 50-51;

See also Newport News Co. vs. Schauffer, 303 U.S. 54 (58 Sup. Ct. 466);

United Brick and Clay Workers vs. Lebus, 71 Fed. Supp. 121. [30]

IV.

The National Labor Relations Board also has exclusive jurisdiction to initially determine whether or not parties come within the purview of the Labor Management Relations Act, 1947, in respect to interstate commerce, and also has exclusive jurisdiction to determine representation proceedings.

Industrial Commission of the State of Utah, etc., et al vs. NLRB, U.S.C.A. 10th Cir. (January 31, 1949) 16 Labor Cases, 64,947;

LaCrosse Telephone Corp. vs. Wisconsin Employment Relations, et. al, ... U.S. ....., 16 Labor Cases 64,913 (January 17, 1949);

NLRB vs. Jones and Laughlin Steel Corp., 301 U.S. 1, p. 29.

V.

The Declaratory Judgment Act in no way enlarges the jurisdiction of the Federal Courts; jurisdiction, before an action may be entertained under the Declaratory Judgment Act, must exist; an action may not be maintained under said Act merely because the Plaintiff refuses to use the forum Congressionally established, viz: in this case, Plaintiffs, if unfair labor practices are being committed in violation of the Labor Management Relations Act,

1947, can utilize the National Labor Relations Board by having charges filed with the Board for the purpose of having the Board determine whether or not a Complaint is issuable under the facts in consonance with the Act.

Putnam vs. Ickes, 78 Fed. (2d) 223 (dismissed for improper venue for lack of jurisdiction over the land whose patent was sought to be revoked and over defendants in personam);

Continental Casualty Co. vs. National Household Distributors, 32 F. Supp. 849 (D.C. Wis. 1940):

The Court held in this case that the Declaratory Judgment Act should not be used as an instrument of procedural fencing for the purpose of choosing a forum; Commercial Casualty Ins. Co. vs. Fowles, C.C.A. Wash. (1946), 154 Fed. (2) 884; [31]

West Pub. Co. vs. McColgan, 138 Fed. (2nd) 320 (C.C.A. Cal. 1943);

Sinclair Refining Co. vs. Burroughs, 133 Fed. (2nd) 536 (C.C.A. Okl. 1943);

Mutual Life Ins. Co. of New York vs. Moyle, 116 Fed. (2nd) 434 (C.C.A.S.C. 1940);

State of Wyoming vs. Franke, 58 F. Supp. 890 (D.C. Wyo. 1945);

wherein the Court held that declaratory relief would not lie, nor could it be substituted by an injunction, since an injunction would not lie to enjoin Federal interference with the State's control over the Jack-

son Hole Country in Wyoming, which had been designated by Presidential Proclamation on March 15, 1943; in the instant matter, Congress had expressly limited the jurisdiction under the Labor Management Relations Act, 1947, for the redress of unfair labor practices exclusively with the National Labor Relations Board; hence, declaratory relief in this matter cannot lie and the Complaint must be dismissed;

> Whisler vs. City of West Plains, 137 Fed. (2nd) 938 (C.C.A. Mo. 1943);
> Angell vs. Schram, 109 Fed. (2nd) 380 (C.C.A. Mich. 1940);
> Perlberg vs. Northwestern Mut. Life Ins. Co., 62 F. Supp. 76 (D.C. Pa. 1945);

where the Court held that a declaratory judgment should not be granted where it is within plaintiff's power to make the declaration he seeks purely academic by acts within his own control, and where the decision therein could not finally settle the rights of the parties.

VI.

The Declaratory Judgment Act (U.S.C.A. Title 28, Section 400) is not designed, nor is its purpose, to extend jurisdiction over an area not already covered or expressly forbidden.

> Di Bendetto vs. Morgenthau (1945), 148 Fed. (2nd) 223; [32] 80 U.S. App. D.C. 34, certiorari dismissed, 326 U.S. 686;
> U. S. ex rel. Jordan vs. Ickes, (1944), 143

Fed. (2d) 152, 79 U. S. App. D. C. 144, certiorari denied, 320 U. S. 801;

In this case, it was held that where the Federal Court lacked jurisdiction of a suit for direct coercive relief compelling the Secretary of Interior to execute and deliver prospecting leases for oil and gas on submerged public lands, the court did not acquire jurisdiction, by virtue of this section, to give, indirectly, relief which it could not give directly.

Miles Laboratories vs. Federal Trade Commission, (1944), 140 Fed. (2d) 683, 78 U. S. App. D. C. 326, certiorari denied, 322 U. S. 752, wherein it was stated that this section (Declaratory Judgment Act) is not itself a source of Federal jurisdiction and cannot enlarge the pre-existing jurisdiction of the Federal Courts.

Utah Fuel Co. vs. National Bituminous Coal Commission, (1938), 101 Fed. (2d) 426, 69 App. D. C. 33, affirmed 306 U. S. 56,

wherein the court held that the new power given to the Federal Courts to render a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin. (There is nothing that prevents plaintiffs, assuming their factual declaration is correct or tenable, from proceeding through the National Labor Relations Board.);

Washington Terminal Co. vs. Boswell (1941), 124 Fed. (2d) 235, 75 U. S. App. D. C. 1, certiorari denied, 315 U. S. 795;

Helco Products Co. vs. McNutt, (1943), 137 Fed. (2d) 681.

VII.

An action for declaratory judgment cannot be maintained for veiled purpose of relitigating questions as to which a former [33] judgment is conclusive. The State Supreme Court of California and the Federal Courts have ruled that the exclusive jurisdiction under the Labor Management Relations Act, 1947, to enjoin unfair labor practices rests with the National Labor Relations Board, and not with private parties who initiate the action in either State or Federal Courts.

Chicago Pneumatic Tool Co. vs. Hughes Tool Co., (D. C. Del. 1945), 61 F. Supp. 767, affirmed 156 Fed. (2d) 981; certiorari denied, 67 S. Ct. 204.

Respectfully submitted,

/s/ ALEXANDER H. SCHULLMAN

Attorney for Defendants: Retail Clerks' Union, Local 770; Joseph T. DeSilva, individually and as Secretary thereof; Food and Drug Council of Los Angeles and Vicinity, Thomas Pitts, individually and as President thereof; and Joseph T. DeSilva, individually and as Secretary thereof.

Received copy of the within Notice of Motion this 3rd day of March, 1949

/s/ J. WESLEY CUPP,
Attorney for Plaintiffs.

[Endorsed]: Filed March 7, 1949. [35]

[Title of District Court and Cause.]

STATEMENT OF REASONS IN OPPOSITION TO MOTIONS TO DISMISS THE COMPLAINT AND ANWERING MEMORANDUM OF POINTS AND AUTHORITIES.

Plaintiffs reasons in opposition to the Notice of Motion and/or the Motion of appearing defendants, and plaintiffs Answering Memorandum of Points and Authorities are as follows:

I.

The documents filed herein by appearing defendants are labeled and constitute merely a Notice of Motion. They have failed to file a written motion. This is particularly true of the document filed by and on behalf of the Retail Clerks Union, Local No. 324, and Richard L. Johnson. While the document filed by Retail Clerks Union, Local No. 770 and the defendants joining in said document prays for dismissal of the complaint, the document is labeled Notice of Motion and reads that the parties

[36] will move for dismissal. In United States District Courts motions must be in writing.

Rule 7(b) Federal Rules of Civil Procedure;

Rule 3(i) Rules of the United States District Court of the Southern District of California.

II.

The National Labor Relations Board does not have exclusive jurisdiction over controversies involving unfair labor practices, nor over controversies involving the compelling or coercing of an employer to commit an unfair labor practice within the meaning of the Labor Management Relations Act, 1947.

Labor Management Relations Act 1947, 29 U.S.C. Sec. 141, et seq.

Standard Grocer Company v. Local 406, etc. et al (Mich. 1948) 32 N. W. (2d) 519 14 C.C.H. Lab. Cases 64,523.

Scranton Broadcasters v. American Communication Association (Pa. Ct. Com. Pleas, 1947), 13 C.C.H. Lab. Cases 64,124.

Clelland Simpson Co. v. American Communication Association (Pa. Ct. Com. Pleas Nov. 12, 1947), 13 C.C.H. Lab. Cases 64.125.

District Lodge 94 v. International Association of Machinists, etc., et al, (D. C. S. D. Cal. No. 7685, 1948), 15 Lab. Cases 64,564.

III.

Jurisdiction has been pleaded.

(a) The United States District Courts have jurisdiction of civil cases where the matter in contro-

versy exceeds the sum of $3,000.00 and the case arises under a law of the United States.

28 U.S.C. Sec. 41(1). [37]

American Distilling Co. v. City of Sausalito (D. C. N. D. Cal. 1947), 73 Fed. Supp. 520.
James Hiddon's Sons v. Calender (D. C. Minn. 1939), 28 Fed. Supp. 643.

(b) The United States District Courts have jurisdiction of all suits arising under a law regulating commerce whether or not the amount in controversy exceeds the sum of $3,000.00.

28 U.S.C. Sec. 41 (8);

Weiss v. Los Angeles Broadcasting Co. (C.CA. 9th 1947), 163 F. (2d) 313;
Robertson v. Argus Hosiery Mills (C.C.A. 6th 1941), 121 F. (2d) 285.

IV.

Interstate commerce has been properly alleged.

N.L.R.B. v. Fainblatt et al., 306 U. S. 601, 59 S. Ct. 668, 1939.
N.L.R.B. v. Richter's Bakery, 140 F. (2d) 870 (C.C.A. 5).
N.L.R.B. v. Suburban Lumber Company, 121 F. (2d) 829 (C.C.A. 3), cert. den. 322 U. S. 754.

V.

A justiciable controversy has been pleaded and declaratory relief is proper.

Federal Declaratory Relief Act of June 14, 1934 (28 U. S. C. Sec. 400);

Maryland Casualty Co. v. Hubbard (D. C. S. D. Cal. 1938), 22 Fed. Supp. 697.

Lehigh Coal and Navig. Co. v. Central R. of N. J. (D. C. E. D. Pa. 1940), 33 Fed. Supp. 362.

District Lodge 94 v. International Association of Machinists, etc., et al, (D. C. S. D. Cal. No. 7685, 1948), [38] 15 Lab. Cases 64, 564.

Respectfully submitted,

J. WESLEY CUPP &
ROY B. WOOLSEY,
Attorneys for Plaintiffs.

By /s/ J. WESLEY CUPP.

Affidavit of service by mail attached.

[Endorsed]: Filed March 9, 1949. [39]

In the United States District Court Southern District of California, Central Division

No. 9098-BH Civil.

SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION, LTD., etc., et al.,
Plaintiffs,

vs.

RETAIL CLERKS UNION, LOCAL NO. 770, etc., et al.,
Defendants.

ORDER DISMISSING ACTION FOR WANT OF JURISDICTION

On March 29, 1949, this cause came on regularly for the hearing of the Motion to Dismiss Complaint for Declaratory Judgment, filed March 2, 1949, by Defendants, Retail Clerks Union, Local No. 324, an unincorporated association; and Richard L. Johnston, individually and as secretary of said organization; Robert W. Gilbert and Louis A. Nissen, Esqs. appearing for said Defendants; and for hearing of the Motion to Dismiss Complaint for Declaratory Judgment, filed March 7, 1949, by Defendants, Retail Clerks Union, Local No. 770, an unincorporated Association; Joseph T. DeSilva, individually and as secretary of said organization; Food and Drug Council of Los Angeles and Vicinity, an unincorporated association; Thomas Pitts, individually and as president of said organization; and Joseph T. DeSilva, individually and as secretary of said organi-

zation; and Alexander H. Schullman, Esq. appearing for said Defendants; and J. Wesley Cupp and Roy B. Woolsey, Esqs. by J. Wesley Cupp, Esq. appearing for the Plaintiffs; and said Motions having been heard by the court, and the court having duly considered said motions, the complaint, memoranda of counsel, and the law applicable, and being fully advised in the premises, ordered said Motions of Defendants, granted on the ground that the court does not have jurisdiction herein;

It Is, Therefore, Hereby Ordered that this action be and it is hereby dismissed on the ground that this court does not have jurisdiction to entertain it.

Dated: Los Angeles, California, March 29, 1949.

/s/ BEN HARRISON,
U. S. District Judge.

Judgment entered Mar. 29, 1949.

Docketed Mar. 29, 1949.

[Endorsed]: Filed March 29, 1949. [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Honorable Benjamin Harrison, Justice of the said District Court of the United States for the Southern District of California, Central Division, and to Alexander H. Schullman and Robert W. Gilbert, Attorneys for Defendants:

Take Notice, that the plaintiffs in the above entitled action hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment of the said District Court of the United States made and entered in the said court on the 29th day of March, 1949, sustaining the Motion to Dismiss the Complaint for Declaratory Judgment in favor of defendants and against the plaintiffs, and from the whole of said judgment.

/s/ J. WESLEY CUPP,
Attorney for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed April 12, 1949. [42]

[Title of District Court and Cause.]

DESIGNATION OF RECORD FOR APPEAL

To: The Honorable Benjamin Harrison, Justice of the said District Court of the United States for the Southern District of California:

Appellants herein, plaintiffs in the above entitled action, desire to, and do hereby, designate that the complete and entire records and Judgment Roll before this Court shall be contained in the Record on Appeal, said record to include all argument made by counsel before this Court on the Motion to Dismiss Complaint.

Dated: April 11, 1949.

/s/ J. WESLEY CUPP,
Attorney for Plaintiffs.

[Endorsed]: Filed April 12, 1949. [44]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California
County of Los Angeles—ss.

Luella Schweigert, being first duly sworn, says:

That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to

the above entitled action; that affiant's business address is 417 South Hill Street, Los Angeles 13, California; that on the 13th day of April, 1949, affiant served the Designation of Record for Appeal heretofore filed on the defendants in said action by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendants in said action at the office address of said attorneys as follows:

Alexander H. Schullman, 415 Subway Terminal Building, [45] 417 South Hill Street, Los Angeles 13, California, Attorney for defendants Retail Clerks Union, Local No. 770, Joseph T. DeSilva, individually and as Secretary thereof; Food and Drug Council of Los Angeles and Vicinity, Thomas Pitts, individually and as President thereof, and Joseph T. DeSilva, individually and as Secretary thereof.

Robert W. Gilbert, 117 West Ninth Street, Los Angeles 15, California, Attorney for Defendants Retail Clerks Union No. 324 and Richard L. Johnston, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the persons by and for whom said service was made.

That there is delivery service by the United States mail at the place so addressed and there is a regular

communication by mail between the place of mailing and the place so addressed.

/s/ LUELLA SCHWEIGERT,

Subscribed and sworn to before me this 13th day of April, 1949.

[Seal] /s/ SHAN E. BULLOCK,
Notary Public in and for said County and State.

[Endorsed]: Filed April 14, 1949. [46]

[Title of District Court and Cause.]

ORDER GRANTING EXTENSION OF TIME TO FILE TRANSCRIPT AND RECORD

Notice of Appeal and Designation of Record for Appeal having been duly filed on April 11, 1949, and a request placed with Mr. J. D. Ambrose, Reporter of the above-entitled United States District Court, that such transcript be placed with the Clerk of said Court for certification; and it having been shown that failure to file said transcript and record has been due entirely to the extremely crowded calendar of said reporter, J. D. Ambrose, and without any fault on part of Appellant;

It is Hereby Ordered that Appellants shall be, and hereby are granted thirty (30) days extension of time in which to file said transcript and record.

Dated: Los Angeles, California, May 20, 1949.

/s/ BEN HARRISON,
U. S. District Judge.

[Endorsed]: Filed May 23, 1949. [47]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 47, inclusive, contain the original Complaint for Declaratory Judgment; Notice of Motion of defendants Retail Clerks Union No. 324 et al to Dismiss; Notice of Motion of defendants Retail Clerks Union, Local No. 770 et al to Dismiss; Statement of Reasons in Opposition to Motions to Dismiss the Complaint etc; Order Dismissing Action for Want of Jurisdiction; Notice of Appeal; Designation of Record for Appeal; Affidavit of Mailing and Order Granting Extension of Time to File Transcript and Record which, together with original reporter's transcript of proceedings on March 29, 1949, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 17 day of June, A. D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By THEODORE HOCKE,
Chief Deputy. [49]

[Endorsed]: No. 12273 United States Court of Appeals for the Ninth Circuit. Southern California Retail Druggists Association, Ltd., a non profit corporation, etc., et al., Appellants, vs. Retail Clerks Union, Local No. 770, an unincorporated association, etc., et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 20, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12273

DESIGNATION OF RECORD

SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION, LTD., a nonprofit corporation, etc., et al,

Appellants,

vs.

RETAIL CLERKS UNION, LOCAL NO. 770, an unincorporated association, etc., et al,

Respondents.

The Clerk of the United States Court of Appeals—Ninth Circuit; Robert W. Gilbert, Louis A. Nissen, and Alexander H. Schullman, Attorneys for Respondents, will please take notice:

The Appellants herein designate that the entire record in the above entitled action is material to the review thereof and shall be made available for the hearing of [53] this appeal, and it is hereby designated that the Clerk of the above entitled Court shall have the said entire record printed on appeal.

/s/ J. WESLEY CUPP,
Attorney for Appellants.

[Endorsed]: Filed June 25, 1949. [54]

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS WILL RELY

Come now the Appellants, and for a Statement of Points Upon Which Appellants Will Rely, set forth the following:

I.

The alleged Remedy before the National Labor Relations Board is in fact non-existant, and on these facts there is NO remedy provided by the amended National Labor Relations [51] Act of 1947 before the National Labor Relations Board.

II.

This is an action equitable in nature, and unless specifically excluded from the jurisdiction of Court, jurisdiction will attach.

III.

Every element and requisite of Jurisdiction in the Federal Courts is present.

IV.

There is certain inherent jurisdiction, even in this Court of delegated powers, and Appellants present a case within the scope of that inherent jurisdiction.

/s/ J. WESLEY CUPP,
Attorney for Appellants.

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